

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

ERIC J. OPSVIG,)	
)	
Appellant,)	PCHB NO. 05-102
)	
v.)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY, and CITY)	
OF NORTH BEND,)	
)	ORDER OF CONSOLIDATION AND
Respondents.)	DENIAL OF TEMPORARY STAY
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DOUGLAS SCATES,)	
)	
Appellant,)	
)	
v.)	
)	PCHB NO. 05-108
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY, and CITY)	
OF NORTH BEND,)	
)	
Respondents.)	
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Two residents of North Bend separately appealed the issuance of a preliminary permit granted July 22, 2005, by the Washington State Department of Ecology (“Ecology”) to the City of North Bend (“City”) to drill and test a mitigation well under a groundwater application filed by the City (G1-26617A (City of North Bend)). Daniel Opsvig filed his appeal with the Board on June 25, 2005, in which he requested “an immediate stay” of the permit, as well as a stay of a variance granted June 25, 2005, by Ecology to a Mr. Stephen Thomas of Golder Associates, Inc., a city contractor, to drill

1 the test well within the 100-foot setback from septic systems required by WAC 173-160-
2 171(3). On July 25, 2005, Douglas Scates notified the Board orally on July 25, 2005, of
3 his intention to file an appeal with the Board and to request “an immediate appeal and
4 stay” of the proposed mitigation well. He filed his appeal in writing with the Board on
5 July 27, 2005. On its own motion, the Board hereby consolidates the Opsvig and Scates
6 appeals.

7 The appellants notified the Board of their understanding that drilling would begin
8 as early as July 27, 2005. The City later confirmed that drilling would commence July
9 27. For this reason, the Board scheduled and held an oral argument on appellants’
10 requests for an immediate stay on the afternoon of July 26, 2005, at which time it heard
11 arguments from both appellants, Ecology, and the City. Dr. Opsvig and Mr. Scates
12 represented themselves *pro se*. Attorney Thomas M. Pors represented the City. Assistant
13 Attorney General Stephen H. North represented Ecology.

14 For purposes of this emergency stay motion, the Board received argument,
15 including testimony from the appellants. Although their testimony was unsworn, the
16 Board admits it for purpose of considering this motion. In addition, the Board received
17 from the City and admitted the declarations of Bob Anderson, a hydrogeologist with
18 Golder Associates, and Ron Garrow, Public Works Director for the City of North Bend.
19 It also received from Ecology and admitted the declaration of Andrew Dunn, a
20 hydrogeologist with Ecology.

1 ***Standard for a Temporary Stay***

2 Under Civil Rule 65 (CR 65) a temporary restraining order may be granted if the
3 moving party establishes: (1) a clear legal or equitable right, (2) a well-grounded fear of
4 immediate invasion of that right, and (3) that the acts complained of are either resulting in
5 or will result in actual and substantial injury to him. *Tyler Pipe Indus. v. Dept. of*
6 *Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) *citing Port of Seattle v. International*
7 *Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 324 P.2d 1099 (1958). The
8 Board has previously considered requests for temporary stays in similar circumstances.
9 *See Columbia River Alliance for Nurturing the Environment (CRANE) v. Ecology et al.*,
10 PCHB 03-095 (August 14, 2003); *Airport Communities Coalition v. State of Washington*,
11 PCHB No. 01-160 (December 17, 2001).

12 ***Discussion***

13 Appellants assert that they reside in the area of the proposed test well and would
14 be affected by the drilling and operation of the well. Dr. Opsvig raised concerns about
15 the impact of the well to his septic system, which he says is within the 100-foot setback
16 required by WAC 173-160-171(3). He testified that the location of the well could deny
17 him access to or use of his reserve septic drain field, and that possible percolation of
18 contaminants could affect his property. Mr. Scates testified that the existence of sinkholes
19 in the area suggested that the land was unsuitable for well drilling, and could destabilize
20 the land.

The appellants acknowledge that they presently have no evidence to support their concerns, but argue that because the permit and variance were granted only days before the drilling was to commence, they have had no opportunity to consult with attorneys or hydrogeologists before submitting their request for a stay. They argue that a temporary stay is necessary to maintain meaningful review before the Board.

In response, the City states that appellants have not met their burden for a temporary stay because the harm asserted is speculative and not based on specific facts. They state that the City has complied with notice requirements and even provided timely notice to Opsvig by letter. In any event, they argue, the permit for the proposed test and mitigation well project is temporary, contains numerous conditions to ensure that environmental harm is mitigated, and will be terminated if any environmental impacts are determined. Finally, they state that the testing window for this project is limited and drilling must be started as soon as possible so that pumping can begin by mid-August. If the project is not completed this year, the City stands to lose state funding for the project, as well as substantial costs already incurred in preparing for the project. Ecology also states that appellants received proper notice, and have asserted no immediate or irreparable injury, and cite to no evidence of harm other than speculation.

The Board concludes that appellants have not met their burden for a temporary stay. While we find that Dr. Opsvig has established a clear legal and equitable right in that his septic drain field is within 100 feet of the proposed well, he has not demonstrated that his fear of

1 immediate invasion of that right is well grounded.¹ First, he has not shown that the proximity of
2 this well to his septic system will create an actual or substantial injury. Even assuming that it
3 may affect his future access to or use of a reserve drain field, such impacts are not immediate and
4 mitigation of those impacts, if any, can be addressed at a future time. Moreover, his assertions
5 regarding the potential of such impacts rising to the level of immediate and irreparable harm are
6 contradicted by the declarations of Messrs. Dunn and Anderson. Mr. Dunn stated that “because
7 the variance requires the well to be sealed to a depth of at least 250 feet (below what is believed
8 to be a confining layer of sediment), the mitigation well will be withdrawing water from the deep
9 semi-confined aquifer, and because the City of North Bend will be constructing a shallow
10 monitoring well nearby, the possibility of any harm coming from Ecology’s preliminary permit
11 is minimal, if non-existent.” Dunn Decl., Para. 14. Mr. Anderson provided a similar analysis,
12 finding that the surface seal will ensure that there is no impact to Dr. Opsvig’s drain field, and
13 that the drain field is more protected than if the well were drilled 100 feet away, because state
14 standards would only require an 18-foot surface seal in that situation. Anderson Decl., paras. 7-
15 8, 10. The assertion regarding the presence of sinkholes and the effects of the well on
16 surrounding land also lacks the specificity required to demonstrate actual or substantial harm.

17 Nor can the Board conclude that appellants have not had notice of the project sufficient to
18 allow them to seek assistance from an attorney or geologist. There is no assertion that either the
19

20 ¹ Appellant Scates has not at this time established a clear legal or equitable right. His so-far unperfected appeal does
21 not include his address or any other information regarding the property that would suffer potential actual or
substantial harm.

1 City or Ecology violated state or local public notice requirements. Moreover, the declaration of
2 Mr. Garrow indicates that Dr. Opsvig was informed of the project by letter dated July 13, 2005,
3 in which the project was described and the consultant was identified. The letter invited Dr.
4 Opsvig to contact the consultant if he had questions or concerns. Dr. Opsvig attempted to file an
5 appeal with this Board on July 14, 2005, more than a week before the permit or variance were
6 issued. Because the appeal was incomplete, the Board sent Dr. Opsvig a letter on July 19, 2005,
7 informing him of the need to perfect his appeal. Mr. Anderson declared that he spoke to or e-
8 mailed Dr. Opsvig at least twice before the appeal was filed.

9 The Board is aware that appellants have had limited time to investigate any potential
10 problems associated with the proposed well, or to obtain counsel. Nonetheless, the issuance of
11 the permit and variance authorizes the City to go forward with the well drilling, and Board can
12 issue a temporary stay of that authorization only if the appellants make a showing of a well-
13 grounded fear of immediate invasion of that right, and actual and substantial injury to him
14 resulting therefrom. As of this time, the appellants have not done so.

15 The Board's decision in this order is limited only to the motion for a temporary stay. The
16 appeals themselves are ongoing, and will be scheduled for a pre-hearing conference shortly.
17 Moreover, our action today does not preclude motions for a stay pursuant to WAC 371-08-415.

18 Based on the above discussion, the Board issues the following

19 **ORDER**

20 Appellant Eric Opsvig's request for a temporary stay is DENIED.

1 Appellant Douglas Scates' request for a temporary stay is DENIED.

2 PCHB 05-102 and PCHB 05-018 are hereby consolidated.

3
4 DONE this 27th day of July 2005.

5 **POLLUTION CONTROL HEARINGS BOARD**

6 DAVID W. DANNER, Presiding

7 BILL CLARKE, Chair

8 WILLIAM H. LYNCH, Member